mandated by *Sanderson Plumbing*, the Fifth Circuit reversed the trial court's denial of Compass Group's motion for judgment as a matter of law and rendered a take-nothing judgment against Bryant. *Id.* at 479.

In *Sanderson Plumbing*, the Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Sanderson Plumbing*, 530 U.S. at 148. With respect to the standard in reviewing a judgment as a matter of law, the Court noted that a reviewing court "must draw all reasonable inferences in favor of the nonmoving party." *Id.* at 150. Further the reviewing court must not make any credibility determinations. *Id.* Moreover, credence must be given to the evidence favoring the nonmoving party as well as evidence supporting the moving party that is uncontradicted and unimpeached where that evidence comes from a disinterested third party. *Id.* at 151.

A review of the Fifth Circuit's opinion below demonstrates that the court followed the mandates of *Sanderson Plumbing*. The court below indicated several times that it reviewed the entire record in making its decision. "[W]hen evaluating the sufficiency of the evidence, we view all evidence and draw all reasonable inferences in the light most favorable to the verdict." *Bryant*, 413 F.3d at 475. The court also noted that while it would not "parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision, and a showing of pretext," it would "inquire whether the record contains sufficient evidence to support the jury's ultimate finding." *Id.* at 476.

The court specifically found that there was no legally sufficient evidence to find that Chartwells' asserted justification for Bryant's termination was false. *Id.* at 477. Thus, Bryant was not able to establish the second part of the *Sanderson Plumbing* analysis, making irrelevant an analysis regarding the strength of the prima facie case. Accordingly, the Court of Appeals did not make a decision inconsistent with existing Supreme Court authority.

Bryant complains that the Fifth Circuit "did not consider Bryant's prima facie case nor discuss how Bryant's prima facie case factored into the court's evidentiary analysis." Pet. 14. However, Bryant's Petition fails to identify how his prima facie case would cast doubt on Chartwells' articulated legitimate, nondiscriminatory reason for his termination. The court below determined that Bryant failed to produce any evidence to rebut or contradict Chartwells' reliance on the statement of a police officer—a disinterested third party—that Bryant had confessed to a theft at the bat mitzvah. *Bryant*, 413 F.3d at 477. With respect to Bryant's discrimination claim, none of the evidence used to prove his prima facie case of discrimination relates in any way to Chartwells' proffered legitimate, nondiscriminatory reason for his termination—that the police officer reported that Bryant confessed to the theft. Similarly, the proof used by Bryant in proving his prima facie case of retaliation does not tend to disprove Chartwells' reason for his termination. With respect to the retaliation claim, Bryant relies on the proximity in time between his filing of an EEOC charge and his termination. However, this evidence does not cast doubt on the testimony of the police office that he told Chartwells that Bryant confessed to the theft. As a result, Bryant has failed to demonstrate to this Court that evidence related to his prima facie case could factor into the Fifth Circuit's analysis.

Moreover, the additional evidence that Bryant identifies in his Petition fails to establish evidence of pretext. Pet. 14. The Fifth Circuit expressly rejected Bryant's claim that the alleged conspiracy among the Hispanic employees to "set-up" Bryant established pretext because none of the Hispanic employees were decision-makers and Bryant failed to show that any of them influenced the actual decision-makers. *Bryant*, 413 F.3d at 477-78. Further, the alleged conspiracy among the Hispanic employees would not be evidence related to pretext, but to actual unlawful intent. On that issue, the Fifth Circuit found that there was no evidence that the conspiracy was racially motivated or that the alleged conspiracy was based on unlawful retaliation because the Hispanic employees did not know that Bryant had filed a Charge of Discrimination with the EEOC. *Id.* at 477. The Fifth Circuit also addressed other evidence in the record related to unlawful motivation such as alleged disparate treatment of similarly situated employees, but determined that there was no such evidence to support the jury's verdict. Bryant does not challenge that determination in his Petition.

Sanderson Plumbing requires Bryant to submit sufficient evidence of pretext in order to withstand a motion for judgment as a matter of law. Such pretext evidence was absent from this case. The record is undisputed that Chartwells terminated Bryant after Lt. Bowden informed the company that Bryant confessed to stealing the money at the bat mitzvah. There simply was no way Bryant could or did dispute this evidence after both Lt. Bowden and Walters, the decision-maker, testified to this fact. Because Bryant failed to meet the standard set forth in *Sanderson Plumbing* by producing "sufficient evidence of pretext," the Fifth Circuit properly reversed the denial of the motion for judgment as a matter of law. Bryant's claim that the Fifth Circuit somehow

required him to show "pretext plus" must be rejected on the basis that Bryant failed to produce any evidence of pretext.

II. No Circuit Split Exists Regarding the Consideration of a Plaintiff's Prima Facie Case in Determining Whether the Plaintiff Has Demonstrated Unlawful Discrimination or Retaliation.

Bryant's Petition alleges that the circuit courts have split on the issue of whether *Sanderson Plumbing* requires consideration of a plaintiff's prima facie case in determining whether the plaintiff has established sufficient evidence of pretext following a grant or denial of a motion for judgment as a matter of law. Bryant claims that certain circuit courts have held that the reviewing court must consider the evidence proffered during a plaintiff's prima facie case in considering the sufficiency of evidence regarding pretext. Pet. 15. Bryant apparently argues that the Fifth Circuit has rejected these holdings because of its statement in *Bryant* that the court would not "parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision and a showing of pretext." *Bryant*, 413 F.3d at 476.

The Fifth Circuit's refusal in *Bryant* to parse the evidence into discrete segments in no way reflects a refusal by that court to consider all of the evidence presented by Bryant. As discussed above, the Fifth Circuit indicated in the *Bryant* decision that it reviewed the entire record in rendering its decision. *Bryant*, 413 F.3d at 476 ("'[W]e inquire whether the record contains sufficient evidence to support the jury's ultimate findings" (quoting *Smith v. Berry Co.*, 165 F.3d 390, 394 (5th Cir. 1999)). In fact, none of the cases cited by Bryant as evidence of a split among the circuits warrants the conclusion that the circuits have different standards when

reviewing whether a plaintiff has provided sufficient evidence of pretext. Bryant mistakes the Fifth Circuit's refusal to compartmentalize a plaintiff's evidence for a refusal to consider a plaintiff's prima facie evidence. Indeed, in nearly all of the cases cited by Bryant, including those in the Fifth Circuit, the courts expressly noted that they reviewed the entire record in their respective cases. *See Miller v. EBY Realty Group LLC*, 396 F.3d 1105, 1110 (10th Cir. 2005) ("[W]e consider the record in its entirety"); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2000) ("We shall review all the evidence in the record"); *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 574 (5th Cir. 2003) ("We must examine all the evidence in the record as a whole"); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 384 (5th Cir. 2003) ("We will therefore review all of the evidence in the record").

Bryant is incorrect that the Fifth Circuit follows a different standard of review with respect to evidence regarding a plaintiff's prima facie case of unlawful discrimination or retaliation. Bryant implies that the *Nabors Drilling* court disregarded evidence of the plaintiff's prima facie case by stating that parsing evidence into discrete segments is unimportant when a case has been fully tried on the merits. Pet. 16. However, as quoted above, the Fifth Circuit in *Nabors Drilling* expressly stated that it would review the entire record. *Nabors Drilling*, 330 F.3d at 384. Further, Bryant's claim that the court in *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463 (5th Cir. 2002), refused to consider evidence of the plaintiff's prima facie case where the case had been fully tried on the merits (Pet. 16) completely misstates the holding in *Raggs*. Contrary to Bryant's representation, the *Raggs* court stated: "[W]hen a full trial on the merits has been conducted, this Court focuses not on the plaintiff's *prima facie* case, but on the ultimate question of whether the record

contains evidence to support a jury finding of race discrimination." *Raggs*, 278 F.3d at 468.

In sum, Bryant has failed to demonstrate that a circuit split exists by distinguishing between those courts that parse the evidence and those that do not. This is a distinction without a difference because all of the circuits at issue review the entire record when determining whether a plaintiff has provided sufficient evidence of unlawful retaliation or discrimination. The entire record includes evidence on the issues of Bryant's prima facie case, pretext, and unlawful motivation. Therefore, review by this Court is not appropriate based on Bryant's claim that the lower court's decision reflects a split in the courts of appeals.

III. The Question of the Constitutionality of Remittitur in Light of the Seventh Amendment's Re-Examination Clause Does Not Warrant Consideration by this Court

A. *Bryant's Failure to Produce Sufficient Evidence of Pretext Precludes Review of Any Constitutional Issues Related to the Conditional Remittitur Order*

Because the Fifth Circuit properly held that Bryant failed to produce sufficient evidence to support the jury's verdict finding that Compass Group unlawfully discriminated and/or retaliated against him, the Court of Appeals never addressed the Seventh Amendment issue raised by Bryant in his Petition. Similarly, the issue of whether the trial court violated the Seventh Amendment by giving Bryant the option of remittitur or a new trial is not properly before the Court because Bryant's failure to demonstrate that there was sufficient evidence to support the jury's verdict makes both a new trial and damages unavailable. Therefore, this Court cannot

consider the question of the constitutionality of the remittitur procedure based on the record in this case.

B. *Bryant Cannot Appeal His Acceptance of the Remittitur*

Bryant argues that his "conditional acceptance" of the remittitur preserves the issue for appeal. Pet. 17. Bryant's claim ignores this Court's contrary jurisprudence on the ability of a plaintiff to appeal an accepted remittitur. In *Dononvan v. Penn Shipping Co.*, 429 U.S. 648 (1977), this Court held that "a plaintiff cannot 'protest' a remittitur he has accepted in an attempt to open it to challenge on appeal." *Donovan*, 429 U.S. at 649. Accordingly, federal courts have refused to allow plaintiffs to appeal remittitur orders once accepted. *See, e.g., Anderson v. Roberson*, 249 F.3d 539, 542 n.2 (6th Cir. 2001) ("Plaintiffs' attempt to accept the remittitur under protest is plainly inappropriate"); *Rangolan v. County of Nassau*, 370 F.3d 239, 243-44 (2d Cir. 2004) (plaintiff not allowed to appeal reduction in awards once conditional remittitur accepted).

Bryant cites no authority for the proposition that he can preserve his objection to the remittitur procedure by "conditionally accepting" it. Therefore, in light of definitive precedent holding otherwise, this Court should reject Bryant's attempt to raise the issue.

C. *The Supreme Court Has Already Declared Conditional Remittitur Constitutional*

Bryant's Petition argues that requiring a plaintiff to choose between a new trial and remittitur raises an important question of constitutional law not yet decided by this Court. Pet. 16. Specifically, Bryant claims that forcing a party to choose

between a new trial and remittitur violates the Seventh Amendment's right to a jury trial. *Id.* However, Bryant's argument is contrary to established precedent from this Court.

This Court has previously held that the conditional remitter procedure about which Bryant complains does not violate the Seventh Amendment. In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this Court stated that the Seventh Amendment does not inhibit a trial court's discretion to overturn verdicts for excessiveness or to order a new trial unconditionally, or to condition the order of a new trial on the verdict winner's refusal to agree to a reduction. *Gasperini*, 518 U.S. at 433. The decision in *Gasperini* expressly noted that the Court's prior decision in *Dimick v. Schiedt*, 293 U.S. 474 (1935), stands for the proposition that remittitur withstands attack under the Seventh Amendment. *Id.* In *Dimick*, the Court noted it had never expressed doubt about the ability of a trial court to order conditional remittitur. *Dimick*, 293 U.S. at 483. Further, in *Hetzel v. Prince William County, Va.*, 532 U.S. 208 (1998), the Court held that the remittitur procedure withstands scrutiny under the Seventh Amendment provided that the trial court offers the choice of a new trial. *Hetzel*, 523 U.S. at 211.

Bryant provides no basis in his Petition for the Court to review the conditional remittitur procedure. Bryant must demonstrate error by the Court of Appeals on the liability issue before this Court may consider the remittitur issue. Bryant cannot demonstrate such error. Moreover, by accepting remittitur, Bryant lost any ability to appeal the trial court's conditional remittitur order. Further, this Court previously has held that the conditional remittitur procedure does not violate the Seventh Amendment. Therefore, Bryant has failed to raise any issue justifying review of the lower court's decision.

CONCLUSION

For the foregoing reasons, Bryant's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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